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No. 94-1597

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TRANSCRAFT CORPORATION and
CUNNINGHAM ENTERPRISES CORPORATION,

Petitioners,

v.

LIBERTY MUTUAL INSURANCE COMPANY, INC., a corporation,
GALVIN, STALMACK, KIRSCHNER & CLARK, a partnership,
FRANCIS J. GALVIN, JR., Attorney at Law and
ERIC L. KIRSCHNER, Attorney at Law,

Respondents.

RESPONSE TO PETITIONERS' MOTION FOR LEAVE TO FILE AFFIDAVIT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Now come respondents, [1] Galvin, Stalmack, Kirschner & Clark, Francis J. Galvin, Jr., and Eric L. Kirschner, by one of their attorneys, Nancy G. Lischer, and pursuant to Supreme Court Rule 21.4, submit the following in opposition to petitioners' motion for leave to file affidavit in support of the petition for a writ of certiorari.

Petitioners seek to file an affidavit of an expert claiming that the Seventh Circuit improperly relied on economic treatises. One author has now been hired

---

[1] Petitioners have named Liberty Mutual Insurance Company, Inc. as a named respondent. However, Liberty paid the judgment entered against it and was not party to the appeal before the Seventh Circuit. *Transcraft Corp. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 814, 821 (7th Cir. 1994). It is, accordingly, not a respondent in this Court.

by the petitioners and it is his affidavit they seek to present to this Court in support of their petition. Petitioners misstate the Seventh Circuit's opinion and ignore the court's analysis which criticized the petitioners' expert's presumption that the corporation had scrap value once it made the business decision to self-insure. *Transcraft Corp. v. Galvin, Stalmack, Kirschner & Clark*, 39 F.3d 812, 819 (7th Cir. 1994) (App. to Pet. A-10). The Seventh Circuit held that evidence of the value of the corporation as a "going concern" was scrap value "consisted solely of the expert's say-so, and was unworthy of belief." *Id.* at 819 (App. to Pet. A-10). This was in accord with this Court's holding in *Brooke Group. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. __, 125 L.Ed.2d 168, 198 (1993) (holding that "[w]here an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). Although the Seventh Circuit made a passing reference to two books, it was literally parenthetically. *Id.* at 818-19 (App. to Pet. A-8).

This Court should deny petitioners' motion. *In re Easton*, 95 U.S. 68, 77 (1877) (holding that the determination of whether to issue a writ of prohibition must be decided upon facts in the record, not dehors the record.) *Accord Arlington City Cab Co. v. R.T.A.*, 82 Ill.2d 458, 413 N.E.2d 408, 410 (1980) (holding that an affidavit submitted in support of a petition for leave to appeal would not be considered where it was dehors the record). It is well-established that courts of appeals are "courts of limited jurisdiction and are normally bound by the record" created in the court below. *Guinness PLC v. Ward*, 955 F.2d 875, 897 (4th Cir. 1992). This case does not fall into any exception to this general

rule. *See, e.g., County of Dakota v. Glidden*, 113 U.S. 222 (1885) (holding that where the parties settle during the appeal, thus extinguishing the judgment sought to be reviewed, a court may take notice of this fact which affects its jurisdiction).

Wherefore, for the forgoing reasons, respondents Galvin, Stalmack, Kirschner & Clark, Francis J. Galvin, Jr., and Eric L. Kirschner request this Court to deny the motion for leave to file an affidavit in support of the petition for a writ of certiorari.

Respectfully submitted,

Nancy G. Lischer
Hinshaw & Culbertson
222 North LaSalle
Suite 300
Chicago, IL 60601-1081
312/704-3000

Attorney for respondents Galvin, Stalmack, Kirschner & Clark, Francis J. Galvin, Jr., and Eric L. Kirschner

No. 94-1597

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ERIC L. KIRSCHNER, Attorney at Law,

Respondents.

PROOF OF SERVICE AND AFFIDAVIT OF MAILING

I, Gloria Acoff, a non-attorney being duly sworn upon oath depose and state that on the 17th day of April, 1995 at approximately 5:00 p.m., I served all parties required to be served with a copy of the foregoing response to petitioners' motion for leave to file affidavit in support of petition for writ of certiorari and the letter to William K. Suter, Clerk of the United States Supreme Court by depositing the same in the U.S. mail at 222 North LaSalle Street, Chicago, Illinois, enclosed in a sealed

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Supreme Court, U.S.
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MAR 27 1995
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TRANSCRAFT CORPORATION, and
CUNNINGHAM ENTERPRISES
CORPORATION,

Petitioners,

versus

LIBERTY MUTUAL INSURANCE
COMPANY, INC., a Corporation,
GALVIN, STALMACK, KIRSCHNER &
CLARK, a Partnership,
FRANCIS J. GALVIN, JR., Attorney
at Law, and
ERIC L. KIRSCHNER, Attorney at Law,

Respondents.

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MOTION FOR LEAVE TO FILE AFFIDAVIT OF STEWART C. MYERS IN SUPPORT OF PETITION FOR WRIT CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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David J. Theising
CHRISTOPHER & TAYLOR
1219 North Delaware Street
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Indianapolis, Indiana 46206-2850
Telephone: (317) 635-9000
Counsel for Petitioners

Frederic C. Sipe
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SIPE PANKOW HAN RUMELY & HEHNER
225 North Delaware Street
Indianapolis, Indiana 46204
Telephone: (317) 269-1999
Co-Counsel for Petitioners

The Petitioners Transcraft Corporation and Cunningham Enterprises Corporation (hereinafter referred to collectively as "Transcraft"), by counsel, respectfully move the Court for leave to file herein the "Affidavit of Stewart C. Myers in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit" tendered herewith and attached hereto, and in support thereof show this Court that:

1. Petitioners are filing herewith their "Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit." Said Petition includes a list naming all parent companies and subsidiaries of Petitioners.

2. The decision and opinion of the United States Court of Appeals for the Seventh Circuit in this action, reported at 39 F.3d 812, reversed the judgment on jury verdict rendered by the United State District Court for the Southern District of Illinois in favor of Petitioners and against Respondents in the total amount of $1.5 million dollars, and ordered a new trial.

3. At the trial of this action, Transcraft presented the expert testimony of Professor George Launey to assist the jury in determining the amount of damages to which Transcraft was entitled. No objection was made at trial to Professor Launey's qualifications as an economics expert or to the methods utilized by Professor Launey in calculating Transcraft's damages. Nor was any issue raised on appeal concerning Professor Launey's expertise or his methods for calculating Transcraft's damages.

4. In ordering a new trial on the issue of damages, the Court of Appeals rejected the expert testimony of Professor Launey presented at trial by Transcraft:

> . . .the theory of damages that Transcraft was allowed through its economic witness to present to the jury was a fantastic one, revealing on the part of the witness (George Launey) not only a lack of familiarity with the relevant principles of corporate valuation (concerning which there is an extensive scholarly literature illustrated by Clifford W. Smith, Jr., *The Modern Theory of*

Corporate Finance (2d ed. 1990), and Richard A. Brealey & Stewart C. Myers, *Principles of Corporate Finance* (4th ed. 1991)) but also a lack of common sense.

39 F.3d at 818-19.

5. In reliance upon the above-quoted economic treatises (hereinafter referred to as the "economics treatises"), the Court of Appeals injected its own economics expertise into this case, then weighed its own opinions in the field of economics against those of Transcraft's expert economist who testified at trial, and found its own opinion to be the more credible. In doing so, the Court of Appeals simply substituted its own judgment for that of the jury.

6. One of the legal arguments advanced by Transcraft in its Petition for Writ of Certiorari is that it was improper for the Court of Appeals to rely upon the economics treatises which were outside the record, never established as authoritative by any expert witness at trial pursuant to Fed. R. Evid. 803(18), and neither the parties nor the trier of fact ever had any opportunity to consider such treatises or to subject any proponent of such a treatise to cross-examination.

7. Stewart C. Myers, whose affidavit is tendered herewith and attached hereto, is the co-author of one of the economics treatises cited and relied upon by the Court of Appeals in its opinion as a proper authority on the valuation of a corporation.

8. The Affidavit of Stewart C. Myers demonstrates that, as a matter of economics, the method of valuation utilized by Transcraft's expert witness at trial as well as his valuation itself are based upon sound economic principles. Thus, notwithstanding the Court of Appeals' rejection of Transcraft's expert's method of valuation as "fantastic" and lacking in "common sense," one of the very experts cited by the Court of Appeals in its opinion as a proper authority has determined that Professor Launey's analysis does comport

with sound and accepted economic theory.

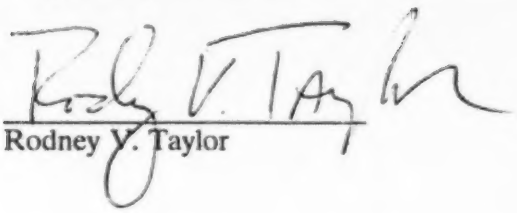
9. Quite aside from the issues raised in Transcraft's Petition for Writ of Certiorari addressed to the legal propriety of the Court of Appeals' reliance upon the economics treatises in rejecting the testimony of Transcraft's economics expert presented at trial, the Affidavit of Stewart C. Myers verifies the propriety of the methods and conclusions of Transcraft's economics expert as a matter of economics.

10. Leave should be granted to file herein the Affidavit of Stewart C. Myers, because the economics treatise of Professor Myers cited and relied upon by the Court of Appeals in its opinion was never admitted nor even identified during the course of the trial below. The first time Professor Myers or his work were ever identified in this action was in the opinion rendered by the Court of Appeals. By reason thereof, Transcraft never had reason nor opportunity to consider such treatise or question the author thereof concerning the economic validity of the methods of valuation utilized by Transcraft's expert witness at trial, until after the Court of Appeals issued its opinion in this case on appeal.

11. Because the testimony of Stewart C. Myers, an expert authority cited and relied upon by the Court of Appeals in granting a new trial on the issue of damages, is not in the record, the Affidavit of Stewart C. Myers would aid this Supreme Court in determining whether the decision and opinion of the Court of Appeals is appropriate, both as a matter of law and as a matter of economics.

WHEREFORE, Petitioners respectfully pray that this Supreme Court grant leave to file herein the Affidavit of Stewart C. Myers in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and for all just and proper relief in the premises.

Respectfully submitted,



Rodney V. Taylor

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David J. Theising
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Telephone: (317) 635-9000
Counsel for Petitioners

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William L. Schlosser
SIPE PANKOW HAN RUMELY & HEHNER
225 North Delaware Street
Indianapolis, Indiana 46204
Telephone: (317) 269-1999
Co-Counsel for Petitioners

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

TRANSCRAFT CORPORATION, and
CUNNINGHAM ENTERPRISES
CORPORATION,

Petitioners,

versus

LIBERTY MUTUAL INSURANCE
COMPANY, INC., a Corporation,
GALVIN, STALMACK, KIRSCHNER &
CLARK, a Partnership,
FRANCIS J. GALVIN, JR., Attorney
at Law, and
ERIC L. KIRSCHNER, Attorney at Law,

Respondents.

AFFIDAVIT OF PROFESSOR STEWART C. MYERS
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

I, STEWART C. MYERS, being first duly sworn, declare and state that the following facts and matters are true and that I have personal knowledge thereof:

1. I am the Gordon Y Billard Professor of Finance at the Massachusetts Institute of Technology and I am Director of the International Financial Services Research Center at The Massachusetts Institute of Technology. A copy of my curriculum vitae is attached hereto as Exhibit A.

2. One reason for remand of this case by the appellate court is that "damages were calculated improperly." I have considered the appellate court's concerns and examined how damages were estimated by the expert witnesses. For this purpose I assumed that

liability for malpractice was established.

3. The appellate decision says that the jury did not have the "materials for a responsible evaluation" of damages. It sees at least two holes in the methods used to estimate damages; that is, the jury was not offered specific answers to the following questions:

a. What is the "but for" world? Absent malpractice, would Transcraft have won the Weekley case outright? If it would have lost the case anyway, could it have avoided punitive damages and retained its access to acceptably priced insurance? There are several but-for possibilities.

b. What specific costs were absorbed by Transcraft when it self-insured? How are the effects of malpractice and loss of acceptably priced insurance separated from the other business and economic factors affecting the value of the company?

4. These are fair questions for an expert witness. The jury was not asked to answer such questions directly, however. It was asked to determine damages under Indiana law, which I understand defines damages as "the difference between the fair market value of the property immediately before the damage and the fair market value of the property immediately after the damage," with fair market value defined by the usual willing buyer, willing seller standard.

5. I was asked to review the expert valuation testimony to see whether the jury had before it sufficient evidence or range of expert opinion to arrive at a judgment of damages consistent with the definition just quoted. I have not conducted a fresh study or estimate of damages.

6. The court strongly criticized Prof. George Launey, who testified for Transcraft. He stated that loss of insurance reduced the immediate value of Transcraft to the liquidation value of its assets, because the company could not be sold as a going concern without insurance, and with a jury award of punitive damages hanging over it.

Launey was focusing on the market value of Transcraft before and after the loss of insurance. He was estimating the "after" price in a hypothetical sale. His position made sense if the costs to Transcraft of self-insuring, or of buying insurance on unfavorable terms, were large enough to push going-concern value below liquidation value. These costs would include those mentioned in the appellate decision, and also the costs a rational buyer would incur to investigate Transcraft before making an offer.[1]

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[1]Transcraft's loss of the Weekley case, with punitive damages imposed, would have put potential buyers at a severe information disadvantage. The net value of the company

7. Whatever one thinks of Launey's arguments or calculations, he did estimate market values before and after the malpractice and loss of insurance. Cross-examination did not challenge him on this. In fact all the experts concentrated on before versus after valuations.

8. The jury may have relied more on the analysis and opinions of the defense experts, since the jury's award to Transcraft was far below Launey's figures. Stewart Zimmerman, who testified for the attorney defendants, said that Transcraft was worth $250,000 less immediately after loss of insurance because the company was "just a little riskier." (Tr. 3182) The jury may have worked up from this number[2] (and from Zimmerman's subsequent use of $700,000 per year as a reserve for self-insurance--much more than Transcraft had been paying for insurance before loss of the Weekley case), rather than down from Launey's.

9. Both Zimmerman and Wayne Grace, Liberty Mutual's expert, insisted that Transcraft be valued as a going concern, so the jury was given a clear alternative to Launey's use of liquidation value.[3]

10. Zimmerman testified that Transcraft was worth more in 1992 than before loss of insurance. (Tr. 3193, 3204) Grace said that Transcraft was worth a little less in 1992 than in 1989 or 1990.

But value can increase (or fall) in spite of loss of insurance if other good (or bad) things happen to the business. Zimmerman's and Grace's 1992 valuations do not show the immediate value change, and do not isolate the effects of malpractice and/or loss of

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depended on how many welds on other trailers were defective; each defective weld was a potential lawsuit for which the buyer would be responsible. The "willing sellers" (Transcraft's owners) would have had strong incentives to conceal or downplay problems, so their assurances could not be credible. The costs to an outside buyer of obtaining accurate information may have been large enough to prevent any sale at a price greater than a verifiable lower bound, e.g. liquidation value. Economic theory predicts such market breakdowns when information asymmetries are large and information is sufficiently costly. See G.A. Akerlof, "The Market for 'Lemons:' Quality and the Market Mechanism," *Quarterly Journal of Economics* 84, 488-500 (1970), and S.C. Myers and N.S. Majluf, "Corporate Financing and Investment Decisions When Firms Have Information Investors Do Not Have," *Journal of Financial Economics* 13, 187-221 (1984).

[2]Zimmerman estimated a $500,000 loss under an "income method," but cut this figure in half by averaging values based on income and on book value. It would have been reasonable to work up from $500,000.

[3]But at Tr. 2945-2946 Grace seems to contemplate sale at liquidation value.

insurance.[4]

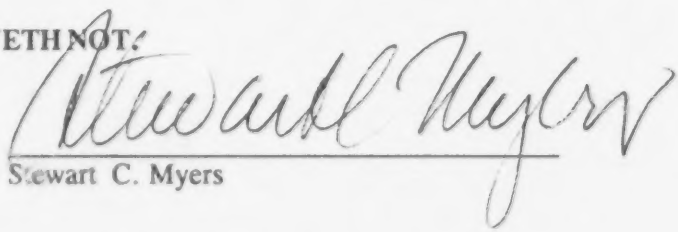
11. Grace specifically stated that lack of product liability insurance had no effect on Transcraft's value, provided that a reserve for self-insurance was deducted from income. This is an extreme position. There must be some additional costs of self-insurance by small or private companies; otherwise it would be more common.[5] Nevertheless Launey and Grace provided the jury with a range of expert opinion on the costs to Transcraft of self-insuring.

12. All the witnesses compared "value before" to "value after." Launey and Zimmerman gave estimates of value immediately after the loss of insurance.[6] In doing so they responded to the letter of the Indiana law, and they offered the jury a range of opinions which bracketed its final determination of damages.

13. The appellate decision would require "before" values set in an explicity specified but-for world. I understand that Indiana law does not require such a specification.

The valuation witnesses were not asked by the judge or by either side's lawyers to respond to the questions raised by the appellate decision. If they had been asked, and had given sensible answers, the credibility of their testimony, as reflected in the written transcript of the case, would be better from the point of view of economics. But the jury was on the spot and had other ways of judging credibility.

FURTHER AFFIANT SAYETH NOT.



Stewart C. Myers

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[4]The court refers to the "principle that where, as in this case, the trial is held long after the damaging event occurs, intervening events may show that any depression in market value immediately after the damaging event. . .was transient and inflicted no harm on the plaintiff . . . ." But this principle cannot be invoked by saying that the value of the company increased over, say, three years. Absent the damaging event, company value could have been still higher three years out. Only the incremental effect of the event should count.

[5]Mayers and Smith have stressed insurance companies' greater administrative efficiency in investigating and processing claims, negotiating settlements and defending lawsuits. A self-insured company must do these things inefficiently. See D. Mayers and C.W. Smith, Jr., "On the Corporate Demand for Insurance," *Journal of Business* 55, 281-296 (1982).

[6]Both also gave valuations for later dates.

STATE OF MASSACHUSETTS)
)SS:
COUNTY OF MIDDLESEX)

BEFORE ME THE UNDERSIGNED, a Notary Public in and for said County and State, personally appeared Stewart C. Myers, and he being duly sworn by me upon his oath, stated that the facts and matters set forth in the foregoing Affidavit of Stewart C. Myers in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit are true, executed the same, and acknowledged the execution thereof.

IN WITNESS WHEREOF, I hereunto set my hand and affix my official Notarial Seal, this 24 day of March, 1995.

My Commission Expires:
May 25, 2001

Barbara Ahearn
Signature of Notary Public

My County of Residence:
Suffolk

Barbara Ahearn
Printed Name of Notary Public

BARBARA AHEARN
NOTARY PUBLIC
My Commission Expires May 25, 2001

EXHIBIT "A"

CURRICULUM VITAE

OF

STEWART C. MYERS

PROFESSIONAL EXPERIENCE

1966-69	Assistant Professor, Sloan School of Management, MIT
1969-76	Associate professor, Sloan School of Management, MIT
1987-88	Visiting Professor, London Business School
1976-84	Professor, Sloan School of Management, MIT
1978-	Research Associate, National Bureau of Economic Research
1984-	Gordon Y Billard Professor of Finance, Sloan School of Management, MIT
1982-87	Area Head for economics, Finance and Accounting, Sloan School of Management, MIT
1988-	Director, International Finance Services Research Center, MIT

HONORARY AND PROFESSIONAL SOCIETIES

American Finance Association
President, 1983
Vice President, 1982
Director, 1984-1985, 1975-977
American Economic Association
Financial Management Association
Southern Finance Association
Eastern Finance Association
Distinguished Scholar Award 1993
Japan Financial Economics Association Board of Advisors, 1993-

CONSULTING (Partial List)

Office of Economics, Federal Power commission
Federal Communications Commission
Eurofinance (Paris)
Communications satellite Corporation
PPG Industries
Association of Oil Pipelines
New York State Public service commission
Buckeye Pipeline Company
Brunswick Corporation
Charles River Associates
Digital Equipment Corporation
Federal Energy Regulatory commission
Pennsylvania Bell Telephone Company
Tax Division, U.S. Department of Justice
Wheeling Pittsburgh Steel Corporation
LOOP, Inc.
Power Authority of the State of New York
Georgia Pacific Corporation
Attorney General, State of Arizona
Chase Manhattan Bank
Palladin Software, Inc.
Merck & Co., Inc.
Marriott Corp.
Phillips Petroleum Corp.
Shell International Petroleum Co., Ltd. (London)
Morgan Stanley, Inc.
Arnold & Porter

OTHER ACTIVITIES

Associate Editor, **Journal of Finance** (1971-1983), **Journal of Financial Economics**, (1974-1988), **Journal of Financial and Quantitative Analysis** (1970-1975), **Journal of Financial Research** (1981-1990); member of Editorial Board, **Midland Corporation Finance Journal** (1983-1988), and **Journal of Applied Corporate Finance** (1989-), **Financial Management** (1993-)

Selection Committee, Batterymarch Fellowship Program, 1981.
Director, Putnam, Hayes and Bartlett, Inc., 1989-1991.
Principal and Director, The Brattle Group, Inc., 1991-.
Director, Centre Cat, Ltd., 199-.

TESTIMONY (Partial List)

"Texas Eastern Transmission Corporation - Cost of Equity Capital Study." FPC Docket RP69-13, 1969.

"AT&T Cost of Capital Study." FCC Docket 19129, 1971.

"A Study of the Risk of Comsat Common Stock." FCC Docket 16070, 1974.

Testimony before the U.S. Senate Special Subcommittee on Integrated Oil Operations, February 1974, and before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, August 1974.

Direct and Rebuttal Testimony, William Pipeline Company. FERC Docket OR79-1, et al., 1979.

"Valuation of Penn Central Intercity Freight Lines, : Direct and Rebuttal Testimony, Valuation Proceedings of the Regional Rail Reorganization Act, 1978, 1980.

Direct and Rebuttal Testimony, Phillips Petroleum Company Iran vs. National Iranian Oil Company, Iran-United States Claims Tribunal, 1983, 1986, 1987.

Direct and Rebuttal Testimony, Massachusetts Automobile Rate Hearings, October 1982, November 1984.

Testimony on calculating the value of damages, MCI Communications Corporation vs. American Telephone and Telegraph Company, Chicago, May 1985.

Direct and Rebuttal Testimony, Kuparuk Transportation Company, FERC Dockets IS85-9-000 and OR85-1-000; Alaska Public Utilities Commission (Direct Only), Docket P-85-2, May-October 1986.

Rebuttal Testimony, Southern Pacific Pipe Lines, Inc., FERC Docket IS85-15-000, 1986.

Direct and Rebuttal Testimony, Endicott Pipeline Co., FERC Docket IS87-36-000, December 1987, March 1989.

Rebuttal and Surrebuttal Testimony, Buckeye Pipeline Company, L.P., FERC Docket IS-87-14-000, April 1988, July 1988.

Testimony on calculating the value of damages from patent infringement, including prejudgment interest, Polaroid Corporation vs. Kodak Corporation, March 1990.

Expert Report, Rebuttal and Surrebuttal Reports, Marathon Oil Co. and Phillips Petroleum Co. v. Department of Revenue, State of Alaska, March-July 1991.

Expert Report, Rebuttal and Surrebuttal reports, U.S.-U.K. Arbitration Concerning Heathrow User Charges, May-June 1991 (with R.A. Brealey)

Testimony on calculating the value of damages from patent infringement, including prejudgment interest, Mobil vs. Amoco, December 1993.